

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 21 CVS 015426

NORTH CAROLINA LEAGUE OF CONSERVATION
VOTERS, INC., *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIR OF THE HOUSE
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

***HARPER* PLAINTIFFS’
REPLY IN SUPPORT OF
SECOND MOTION TO
COMPEL AND FOR OTHER
APPROPRIATE RELIEF**

Legislative Defendants’ opposition makes four central points, each of which is unexplained, untrue, or both.

First, Legislative Defendants’ entire legal argument rests on an unelaborated assertion that the “concept maps” and related information are not within their “possession, custody, or control.” Opp. 8. They offer no response to the well-established caselaw holding that what matters for custody and control is the *ability to obtain information*, not mere possession. Concept maps generated by Legislative Defendants’ staff and used (in Legislative Defendants’ words) as “starting points” for the enacted map for the North Carolina House of Representatives self-evidently meet that standard. So does all of the data or information on the computer used in creating the concept maps. These were legislative records, created by legislative staff, for use by a legislator, and Representative Hall cannot plausibly contend now that he lacks custody or control of such materials.

Legislative Defendants offer no reason to believe these legislative records lie outside their custody and control under the governing legal standard. They say they “searched” for the files, but do not say where, how, or even whose files they searched. Legislative Defendants do not state that they asked Mr. Reel for these materials. They do not state that they even asked Mr. Reel where the files might be, or whether they still exist. They offer no reason to doubt that they have both the legal right and practical ability to obtain these materials from someone who until this month was General Counsel to Representative Hall in his capacity as Redistricting Chair. These omissions are inexplicable, particularly because Representative Hall testified that he did not know who owned the computer on which he viewed the concept maps. The omissions confirm that Legislative Defendants’ discovery responses are inadequate and warrant sanctions.

Second, Legislative Defendants say that their failure to produce the concept maps and related information is inconsequential because Plaintiffs “can seek these documents, if they exist, directly from Mr. Reel.” That theory nullifies Rule 34. Parties must produce information not just in their possession but in their legal “custody” or “control.” Plaintiffs suing employers need not serve subpoenas on every individual current and former employee to obtain all relevant emails; they ask the employer for documents, and the company collects and produces them. Pls.’ Mot. at 7-8 (citing cases). This case is no exception. In any event, it appears that Legislative Defendants have made no effort to determine whether the computer used to create the concept maps was even owned by Mr. Reel (or otherwise that it wasn’t a legislative-staff computer). Once again, Rep. Hall testified that he did not know whose computer it was.

Third, Legislative Defendants assert that the concept maps and related information are “not materially relevant” to this case. That is absurd. Legislative Defendants sought and obtained a court order requiring the production of draft materials for *exemplar* maps evaluated by

the *NCLCV* Plaintiffs' experts. *Harper* Plaintiffs seek drafts of the enacted House map that were created in the legislative building, by Rep. Hall's staff, and that he viewed and considered while he was in the midst of personally drawing the enacted House map. *Harper* Plaintiffs also seek the data and information that was used to create the concept maps on this separate computer. This Court has properly recognized the centrality of this information to the claims in this case. While Legislative Defendants minimize the concept maps as "consulted for a handful of identified districts," Opp. 5, they ignore that each of the county clusters for which Representative Hall may have relied on a concept map is directly at issue in this case: Pitt County, Mecklenburg County, Wake County, and the Forsyth-Stokes county cluster. These are key contested areas of the redistricting plan. And notably, Representative Hall testified that he was not certain about how many concept maps he consulted, confirming that it is imperative that Legislative Defendants produce the underlying material, which may well contain more maps than Representative Hall referenced in his testimony. *See* Pls.' Mot. Ex. C at 118:1-7 [Exhibit PDF page 159] ("probably four or five, somewhere along those lines").

Fourth, while Legislative Defendants resist sanctions, they make no attempt to defend what they told the Court and the *Harper* Plaintiffs in opposing the first motion to compel—that all responsive information is already "publicly available" on the Internet. Those assertions were demonstrably false and Legislative Defendants do not contend otherwise.

At bottom, Legislative Defendants want to offer categorical representations that partisan and election data were not used during the mapdrawing process, while refusing to produce records of or information or data from the "concept maps" that Representative Hall used in creating key county clusters in the enacted House map. That is untenable.

Fifth, Legislative Defendants do not respond to *Harper* Plaintiffs' contention that they are entitled to relief based on the failure of the other four Legislative Defendants to verify the interrogatory responses. The Court accordingly should treat that aspect of *Harper* Plaintiffs' motion as unopposed and grant the relief requested therein to treat the interrogatory responses as making representations only about the conduct and considerations by Rep. Hall and Sen. Hise, and treating the other four Legislative Defendants as having refused to respond to the interrogatories on the basis of legislative privilege.

Respectfully submitted, this the 29th day of December, 2021.

By: /s/ Narendra K. Ghosh

PATTERSON HARKAVY LLP

Burton Craige, NC Bar No. 9180
Narendra K. Ghosh, NC Bar No. 37649
Paul E. Smith, NC Bar No. 45014
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Counsel for Harper Plaintiffs

ELIAS LAW GROUP LLP

Abha Khanna*
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Phone: (206) 656-0177
Facsimile: (206) 656-0180
AKhanna@elias.law

Lalitha D. Madduri*
Jacob D. Shelly*
Graham W. White
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

**ARNOLD AND PORTER
KAYE SCHOLER LLP**

Elisabeth S. Theodore
R. Stanton Jones*
Samuel F. Callahan
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
elisabeth.theodore@arnoldporter.com

Counsel for Harper Plaintiffs

**Pro hac vice motion pending*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to counsel for all other parties.

This the 29th day of December, 2021.

/s/ Narendra K. Ghosh
Narendra K. Ghosh, NC Bar No. 37649